



April 21, 2016

National Freedom of Information Officer
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
E-mail: hq.foia@epa.gov

SUBMITTED VIA ONLINE SUBMISSION FORM

RE: Freedom of Information Act Request

To the National Freedom of Information Officer:

The Center for Food Safety (CFS) is a 501(c)(3) nonprofit organization that addresses the impacts of our current industrial food production system on human health, animal welfare, and the environment. Consistent with this mission and pursuant to 40 C.F.R. Part 2 and the Freedom of Information Act, 5 U.S.C. § 552, I, Ryan Berghoff, on behalf of CFS, respectfully request the following information:

- 1. All records regarding any consultations and requests for consultation, formal or informal, direct or indirect, that the Environmental Protection Agency (EPA) had with the United States Fish and Wildlife Service (FWS) and/or the National Oceanic Atmospheric Administration (NOAA) regarding EPA's proposed decision to register dicamba for new use on herbicide-tolerant cotton and soybeans (Docket No. EPA-HQ-OPP-2016-0187), made pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1536(a) and its implementing regulations.**

"All records" includes but is not limited to all correspondence, minutes, memoranda, communications, reports and/or other documents received from or given to applicants, or other governmental agencies, as well as maps, plans, drawings, emails, reports, databases, and phone notes. This request includes all documents that have ever been within your custody or control, whether they exist in agency "working," investigative, retired, electronic mail, or other files currently or at any other time.

CFS requests this information in light of the President's "Memorandum for the Heads of Executive Departments and Agencies" dated January 21, 2009, which states:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails...In responding to requests

NATIONAL HEADQUARTERS

660 Pennsylvania Avenue, SE, Suite 302
Washington, D.C. 20003
T: 202-547-9359 F: 202-547-9429

CALIFORNIA OFFICE

303 Sacramento Street, 2nd Floor
San Francisco, CA 94111
T: 415-826-2770 F: 415-826-0507

PACIFIC NORTHWEST OFFICE

917 SW Oak Street, Suite 300
Portland, OR 97205
T: 971-271-7372 F: 971-271-7374

HAWAII OFFICE

1132 Bishop Street, Suite 2107
Honolulu, Hawaii 96813
T: 808-681-7688

office@centerforfoodsafety.org

centerforfoodsafety.org

under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. The presumption of disclosure also means that agencies should take affirmative steps to make information public.

Exec. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (Jan. 21, 2009). This request is being sent to the EPA FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

REQUEST FOR FEE-WAIVER

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), EPA waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii).

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(l)(2), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (i) Whether the subject matter of the request concerns the operations or activities of the government.
- (ii) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (iii) Whether disclosure will contribute to a reasonably broad audience of persons interested in the subject.
- (iv) Whether the contribution to public understanding is significant.

40 C.F.R. § 2.107(l). These factors are to be balanced against one another; no one factor is determinative. *See Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

The other requirements in the regulations—related to whether the requester has a commercial interest that outweighs a public interest motivation—are not applicable to CFS and this request. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.,* OMB Fee Guidelines, 52 Fed. Reg. 10017-18; *see also* 40 C.F.R. § 2.107(b)(1). Such interests are not present in this request. CFS does not seek information from EPA for commercial gain or interest. As a 501(c)(3)

nonprofit organization, CFS has no commercial interest in EPA's proposed decision to register dicamba for new uses on herbicide-tolerant cotton and soybeans.

In deciding whether the fee waiver criteria is satisfied, CFS respectfully reminds EPA that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) ("[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information."). Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

I. The present disclosure is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

A. The subject of the disclosure concerns "the operations and activities of the government."

The requested information pertains to EPA's proposed decision to register dicamba for new uses on herbicide-tolerant cotton and soybeans. Because EPA is responsible for regulating the use of herbicides, this request regarding information about the agency's ESA requirements for its proposal to register the herbicide dicamba to control weeds in cotton and soybean genetically engineered to tolerate dicamba relates to operations and activities of the government. This disclosure will demonstrate to the public at large how EPA regulates herbicides, and in particular how EPA fulfills its ESA consultation requirements regarding herbicides, which also directly relates to the operations and activities of the government.

B. The disclosure is "likely to contribute significantly to public understanding" of government operations or activities.

As discussed in the previous section, the present disclosure will provide the public a better understanding of how the EPA analyzes and decides whether to approve the use of herbicides in fulfillment of its regulatory duties, including its duty to consult other government agencies, such as FWS and NOAA, when its decision may impact threatened or endangered species. More specifically, the present disclosure will provide the public with an understanding of how EPA analyzes new uses of herbicides, such as dicamba, on genetically engineered plants designed to tolerate herbicides, and how EPA fulfills its ESA responsibilities. It is essential for members of the public, including consumers and other public interest organizations, to better understand how EPA reviews and evaluates new uses of herbicides in determining their safety to threatened and endangered species. The requested records will meaningfully inform the public

about these government operations or activities in a way not currently available in the public domain. *See* 40 C.F.R. § 2.107(l)(2)(ii).

CFS is a non-profit organization that informs, educates, and counsel the public—via legal action, our website, our True Food Network, books and reports, and our monthly e-newsletter, *Food Safety Now!*—on the harm done to human health, animal welfare, and the environment by industrial agriculture. CFS, along with other national public interest organizations, submitted extensive comments on EPA’s original Notice of Receipt of Application to Register New Use of Dicamba on Monsanto’s Dicamba-Resistant Mon 87708 Soybeans (EPA-HQ-OPP-2012-0545). Accordingly, CFS is an effective vehicle to disseminate information on pesticides and genetically engineered crops, and specifically on EPA’s review of the herbicide dicamba, and their impact on human health, animal health, and the environment.

Simultaneously, this FOIA will help CFS fulfill its well established function of public oversight of government action. Public oversight of agency action in particular is a vital component in our democratic system and is the bedrock upon which FOIA stands.

C. The disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This disclosure will contribute to the understanding of a reasonably broad audience of persons interested in EPA’s proposed decision to register dicamba for new uses on herbicide-tolerant cotton and soybeans. 40 C.F.R § 2.107(l)(2)(iii). CFS is a member-oriented non-profit organization with over 750,000 members that works to address the impacts of the food system on human health, animal welfare, and the environment. Through over a decade of involvement in environmental litigation and policymaking as it relates to food and pesticides, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public. CFS employs science and policy experts¹ who have analyzed FOIA; National Environmental Policy Act (NEPA); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and other environmental and scientific reports for their entire careers. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.² CFS also facilitates members’ ability to confront agency inaction, such as the hundreds of thousands of citizens who petitioned EPA to act upon a CFS formal petition and adopt emergency measures to slow the spread of colony-collapse disorder in honey-bees.³ CFS has also delivered to EPA a petition with over half a million signatures urging EPA to

¹ *See* Leadership, Center for Food Safety, <http://www.centerforfoodsafety.org/staff> (last visited April 20, 2016).

² *See* Publications and Resources, Center for Food Safety, <http://centerforfoodsafety.org/reports> (last visited April 20, 2016).

³ *See* Press Release, Center for Food Safety, 250,000+ to EPA: Time for Emergency Action on Pesticide to Protect Bees (June 28, 2012), <http://centerforfoodsafety.com/press-releases/713/250000-to-epa-time-for-emergency-action-on-pesticide-to-protect-bees>.

follow the European Union's lead in recognizing the risk of neonicotinoid pesticides.⁴ Finally, CFS regularly conveys information in accessible formats to its membership base through "action Alerts" via email.

Federal courts have found that dissemination to 2,500 people through a newsletter and the intent to start a website is sufficient to meet the "reasonably broad audience" factor. *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. *See W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004). CFS's activity in these respects far outstrips any minimums established by judicial interpretation.

II. Obtaining the information is of no commercial interest to CFS.

The Center for Food Safety is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our food production system on human health, animal welfare, and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on the adverse effects of industrial agriculture. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from EPA.

Based upon the foregoing, CFS requests that this FOIA be classified within the EPA's fee waiver category and that EPA send the requested information as required by law. As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous please contact me to discuss the proper scope of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink.

Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

⁴ See Press Release, Center for Food Safety, Half a Million Demand Action from EPA to Save Bees (Mar. 21, 2014), <http://centerforfoodsafety.com/issues/304/pollinators-and-pesticides/press-releases/2995/half-a-million-demand-action-from-epa-to-save-bees>.

Please send all materials to the San Francisco address on the letterhead. Please call me at (415) 826-2770 if you have any further questions about this request. Thank you for your attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ryan Berghoff', with a stylized flourish extending to the right.

Ryan Berghoff
Legal Fellow
Center for Food Safety
303 Sacramento St, 2nd floor
San Francisco, CA 94111
Rberghoff@centerforfoodsafety.org